



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant is a 47-year-old laborer with a tenth-grade education who has worked in the hard manual labor sector of the employment industry his entire working life. On December 13, 1993, claimant stepped on a board while crossing a ditch. When the board gave way claimant fell into the ditch, catching himself with his left elbow, striking his hip on the ground. He sought medical treatment with Dr. P.G. Price, Dr. Thomas Kneidel and, after conservative care, was ultimately released to work by Dr. Kneidel without restrictions.

Claimant testified that he originally brought restrictions back to his employer and was advised that he would be unable to go to work with those restrictions. He then returned to Dr. Kneidel and requested Dr. Kneidel remove all restrictions from his employment. Dr. Kneidel contradicted this testimony, advising that he did not recall this conversation and, further, he would not have placed restrictions upon claimant as a result of the injury suffered with respondent.

Dr. Kneidel did later modify this statement opining during his deposition that if claimant were working at a job which required that he lift in excess of 100 pounds with repetitive bending and stooping, working on his feet all day and using an impact wrench, some reasonable work restrictions would be appropriate.

Claimant was also examined by Dr. William Smith, an orthopedic surgeon from Oklahoma. Both Dr. Smith and Dr. Kneidel diagnosed fractures of claimant's transverse processes at L1, L2 and L3 on the left side. Dr. Smith also diagnosed costochondritis which is an injury to the anterior chest wall. X-rays taken earlier had also revealed a possible compression fracture at T10 and T11. Both Dr. Smith and Dr. Kneidel assessed claimant a 5 percent whole body functional impairment as a result of injuries to his back. Dr. Smith further assessed a 3 percent permanent impairment to claimant's left arm which converted to a 2 percent whole body impairment as a result of the injuries to his left elbow.

Claimant was referred to Mr. Jerry Hardin for an evaluation of his task-performing abilities, or lack thereof. Mr. Hardin stated, based upon the specific restrictions placed upon claimant by Dr. Smith, that claimant would have an 80 percent loss of task-performing abilities. Dr. Smith, after reviewing the evaluation report of Mr. Hardin, agreed that claimant's loss of task-performing abilities stood at 80 percent.

Subsequent to being returned to work with respondent, claimant worked approximately two weeks performing his regular job duties at which time he terminated his employment due to the physical demands of the job. Shortly thereafter he went to work for Belger for approximately three weeks and then for LICO for approximately two months. When both of these jobs terminated due to lack of work, he returned to work for respondent and worked from September 1994 through December of 1994 primarily doing welding. Claimant testified that he was taking up to 12 Advil a day for the pain. Claimant has not worked since December 1994, although he has applied for and received unemployment. The Appeals Board finds, based upon the opinion of Dr. Smith, that the claimant is entitled to a 7 percent whole body functional disability through his last day worked, December 31, 1994.

Dr. Smith, on August 15, 1994, issued permanent restrictions to claimant of no lifting over 50 pounds with occasional lifting from 20 to 50 pounds. Claimant was also restricted from crawling, bending and stooping with only occasional crouching, kneeling and climbing. Pushing, pulling and reaching above shoulders was allowed on a frequent basis.

K.S.A. 44-501 and K.S.A. 44-508(g) make it claimant's burden to prove by a preponderance of the credible evidence his entitlement to benefits under the Kansas Workers Compensation Act. In dealing with the work disability for an injury subsequent to July 1, 1993, K.S.A. 44-510e is controlling and states in part:

"Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The only evidence in the record discussing claimant's loss of task-performing ability comes from Mr. Jerry Hardin and Dr. William Smith. Dr. Smith, after reviewing the opinion of Mr. Hardin, agreed with Mr. Hardin's evaluation and, in adopting this opinion, found claimant capable of performing only 20 percent of his prior work tasks. This results in an 80 percent loss of task-performing ability to the claimant as a result of the injuries suffered on December 13, 1993. Mr. Hardin did agree that if Dr. Kneidel placed no restrictions upon the claimant this would result in a zero percent task-performing loss. Respondent argues Dr. Kneidel, being the treating physician, would be in a better position to assess claimant's restrictions than would Dr. Smith. Dr. Kneidel, during cross-examination, did admit that with the described work responsibilities placed upon claimant, certain restrictions may be in order. Dr. Kneidel was not asked to specify what restrictions would be appropriate. The Appeals Board finds the evidence of Dr. Smith in placing certain restrictions upon claimant is appropriate and supported by a preponderance of the credible evidence. Respondent argued that Dr. Kneidel's opinion contradicts that of Dr. Smith, but the Appeals Board finds that Dr. Kneidel's altered opinion regarding claimant's need for work restriction is sufficiently ambiguous to cause the opinion of Dr. Smith to be the more credible opinion in the record.

While it is acknowledged that claimant worked at jobs paying a comparable wage through December 1994, it is also uncontradicted that subsequent to December 1994, claimant has been unemployed and has been unsuccessful in obtaining comparable wage employment. As such, the Appeals Board finds as of January 1, 1995, claimant has suffered a loss of wage-earning differential of 100 percent between the wage claimant was earning at the time of the injury and what he was earning after the injury.

K.S.A. 44-510e requires that once the loss of ability to perform work tasks is analyzed by the physician and the difference in preinjury and postinjury earnings is computed, these numbers be averaged together in order to find claimant's appropriate work disability. Claimant's 80 percent task loss, when averaged with claimant's 100 percent wage loss, results in a 90 percent permanent partial general body work disability resulting from the injury suffered December 13, 1993. The Appeals Board finds claimant is entitled to a 90 percent permanent partial work disability effective January 1, 1995, subsequent to his last day of employment

### **AWARD**

**WHEREFORE**, the Award of Administrative Law Judge Shannon S. Krysl dated August 11, 1995 is affirmed.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jimmie McElwain, and against the respondent, Ewell Construction Company, Inc., and its insurance carrier, Builders' Association Self-Insurers' Fund, for an accidental injury occurring on December 13, 1993. Claimant is entitled to 13 weeks temporary total disability compensation at the rate of

\$313.00 per week in the amount of \$4,069.00 followed by 29.05 weeks permanent partial disability at the rate of \$313.00 per week in the amount of \$9,092.65 for a 7 percent permanent partial general body functional disability. Beginning January 1, 1995, claimant would then be entitled to \$313.00 per week for a 90 percent permanent partial general body work disability, making a total award not to exceed \$100,00.00.

As of January 8, 1996, there would be due and owing to claimant 13 weeks temporary total disability compensation at the rate of \$313.00 per week in the sum of \$4,069.00, followed thereafter by 29.05 weeks permanent partial general body disability at the rate of \$313.00 week in the sum of \$9,092.65. Effective January 1, 1995, claimant would be entitled to additional permanent partial general body disability at the rate of \$313.00 per week for 53.43 weeks through January 8, 1996, in the amount of \$16,723.59 for a total of \$29,885.24 which is due and owing in one lump sum minus any amounts previously paid. Thereafter, the remaining balance shall be paid at \$313.00 per week until fully paid, or until further order of the Director.

Claimant's permanent partial general body work disability of 90 percent does not begin payment until January 1, 1995, a date subsequent to claimant's last date of employment at a comparable wage.

Pursuant to K.S.A. 44-536, claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting	
Transcript of regular hearing	\$239.08
Metropolitan Court Reporters, Inc.	
Deposition of William Smith, M.D.	\$155.10
Delmont Reporting Services	
Deposition of Jerry D. Hardin	\$143.00
Deposition Services	
Deposition of Thomas W. Kneidel, M.D.	\$131.10

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS  
Wade A. Dorothy, Lenexa, KS  
Shannon S. Krysl, Administrative Law Judge  
Philip S. Harness, Director

**JIMMIE MC ELWAIN**

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**DOCKET NO. 187,062**